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THE ROANOKE RAPIDS CASE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1952

Nos. 28 and 29

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR,
Petitioner

v.

FEDERAL POWER COMMISSION, VIRGINIA ELECTRIC AND POWER COMPANY, ET AL.,
Respondents

VIRGINIA REA ASSOCIATION, ET AL.,
Petitioners

v.

FEDERAL POWER COMMISSION, VIRGINIA ELECTRIC AND POWER COMPANY, ET AL.,
Respondents

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR VIRGINIA ELECTRIC AND POWER COMPANY

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INTRODUCTION

These cases are an attack on an order of the Federal Power Commission that granted a license to Virginia Electric and Power Company for construction of a hydroelectric generating station at Roanoke Rapids on the Roanoke River, North Carolina.

The complicated issues of fact were resolved, after lengthy hearings, by findings of the Commission which were affirmed by the Court of Appeals and are not drawn in question here. The case presents only the question whether the Commission had the legal power to grant a license on the findings so made and the further question whether the Secretary of the Interior has a sufficient interest to entitle him to sue to set aside the Commission's order.

The ground of the attack is that the Commission's licensing authority under the Federal Power Act of 1920 was repealed by implication when the Congress, by the Flood Control Act of 1944, "approved" a comprehensive plan proposing 11 project developments on the Roanoke River. Only two of these projects were authorized for Federal construction as promising substantial flood control benefits, the Buggs Island Dam (recently dedicated under the name of Kerr Dam) and the Philpott Dam. In contrast, the Roanoke Rapids site here involved was a straight power project with no effect for or against flood control. It would, the Commission further found, develop its entire capacity without any increase from Buggs Island.

The attack is not made or supported by the Corps of Engineers of the United States Army, who would have built the Roanoke Rapids project if the Congress had authorized its construction and appropriated funds for the purpose. The attack is made by the Secretary of the Interior as the statutory agency for selling surplus power from dams administered by the Secretary of the Army. He is accompanied,

though in a separate case (No. 29), by an Association of rural electric cooperatives who would buy power from him.

The petitions for review were filed in the Court of Appeals for the Fourth Circuit against the Commission and the Company. Appalachian Electric Power Company and Carolina Power and Light Company, two adjacent electric utilities, intervened in support of the Commission's order.

The Court of Appeals affirmed and certiorari was granted. In recognition that the findings of fact by the Commission were supported by substantial evidence, the petitions raise no factual question here, but only the question of Commission power.

OPINIONS BELOW

The opinion of the Court of Appeals (V 28[1]) is reported at 191 F 2d 796. The opinion and order of the Commission (I 41) is not yet reported.

JURISDICTION

The judgment of the court below was entered on October 1, 1951 (V 46, 68). Petitions for rehearing were filed on October 26 and 30, 1951 (V 47, 69) and denied on November 5, 1951 (V 64, 72). An order was entered by the Chief Justice on January 29, 1952 (V 74) extending the time for filing petitions for certiorari through April 1, 1952. The petitions were filed on March 18, 1952, and granted on May 5, 1952 (VI 71).

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code (28 U. S. C. § 1254 (1)) and on Section 313(b) of the Federal Power Act (16 U. S. C. 825 *l* (b)).

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[1] Citations to the Transcript of Record will be made by a Roman number for the volume followed by an Arabic number for the page.

STATUTES INVOLVED

Section 4 of the Federal Power Act, which establishes the basic powers of the Commission (among them the power under subsection (e) "To issue licenses") is set out in the Appendix to this brief, together with Section 7 (b), authorizing the Commission to recommend for development by the United States itself and Section 10(a) specifying general standards to govern its considerations.

The pertinent provisions of Section 10 of the Flood Control Act of 1944 also appear in the Appendix to this brief. The Report of the Chief of Engineers referred to in the Act appears at I 135 and IV 26.

QUESTIONS PRESENTED

1. Whether the Federal Power Commission retains its basic authority to grant a license for commercial development of a straight power project on a navigable stream, or whether the authorizing provisions of the Federal Power Act were, as to the Roanoke Rapids site, repealed by implication when the Flood Control Act of 1944 "approved" a comprehensive plan proposing 11 project developments on the Roanoke River, though authorizing only two of them for Federal construction as promising substantial flood control benefits, where the Commission finds on the facts that those flood control facilities will not in fact be affected, either favorably or unfavorably, by the construction or abandonment of the straight power project at Roanoke Rapids.

This is the principal question in the case. A secondary question of related nature is:

2. If the Commission's licensing authority was not repealed by implication when the Congress "approved" the plan, did the Commission nevertheless, by Section 7(b) of

the Federal Power Act, lose its jurisdiction by recommending the plan?

A further question, though of less interest as a general matter to the Company than to the Commission, which argues it in full, is:

3. Whether the Secretary of the Interior, and incidentally the rural electric cooperatives, are parties "aggrieved" by the Commission's order in such sense as to qualify them under Section 313(b) of the Federal Power Act to seek judicial review?.

STATEMENT

1.

The Proceeding

The application for the license was filed by the Company on October 6, 1948 (I 41). The Commission requested reports under Section 4(e) of the Federal Power Act from the Department of the Army and from the Department of the Interior (III 1046). The Army's report dealt with navigation (I 191), the Interior's with wildlife resources (VI 2-10). In addition the Secretary of the Interior asked leave to intervene to oppose the issuance of the license for many reasons of fact and for the legal grounds urged here. The intervention was ultimately allowed (I 71), but without admitting any such interest as might make him an "aggrieved" person entitled to appeal.

After lengthy hearings a Decision was filed by the Chief Presiding Examiner on March 17, 1950 (III 1045). The Decision reviewed all the evidence and the Secretary's legal arguments, concluded that the Commission retained its licensing jurisdiction and recommended the issuance of the license. On the request of the Secretary a further hearing was held in June-July 1950. A Supplement to the Exam-

iner's Decision was filed on November 15, 1950 (III 1107). This reviewed the Secretary's contentions in greater detail, both on the facts and on the law, reaffirmed the original conclusion and again recommended the issuance of the license.

After briefs and oral argument the Commission handed down its unanimous Opinion and Order on January 26, 1951, finding in favor of the license and ordering its immediate issuance (I 41, 71). The Opinion gives Commission authority to the Examiner's Decision and Supplement by holding that:

> "The findings of the Examiner appear to be in accordance with the Federal Power Act and the other statutes which we have mentioned and to be fully supported by the weight of evidence and his order should be adopted." (I 46)

In appealing to the United States Court of Appeals for the Fourth Circuit the Secretary and the rural electric cooperatives not only raised the legal issues here asserted, but also urged that the findings of the Commission were unwarranted on the facts (I 1, 33). The opinion of the court (V 28) ruled against these contentions, both on the law (V 32-42) and on the facts (V 42-46), and further concluded that the Secretary and the cooperatives had no standing to sue (V 30-32).

The Secretary's petition for certiorari raises no question as to these factual determinations, but asks review only with regard to the three legal issues stated in QUESTIONS PRESENTED above. The petition for certiorari filed for the rural cooperatives is less distinct in an affirmative sense, but is perfectly distinct in the negative sense that:

> "In order to limit the questions to be presented on petition for writ of certiorari; the petitioners have

omitted the important question of whether the Commission properly determined that VEPCO's proposed project would be 'best adapted' for the development of power as required by Section 10(a) of the Federal Power Act." (p. 8)

2.

The Facts

There being no challenge to the Commission's findings on the facts, they are conclusive here. Moreover, they state the case sufficiently for all present purposes, without resort to the underlying record.

It appears from the Findings of the Commission that as early as 1934 a comprehensive plan for improvement of the Roanoke River Basin was presented to the Congress by the Chief of Engineers, though recommending that it was impractical at that time (I 42). A modification of that plan was submitted in 1944, proposing 11 project developments as being best calculated to promote the maximum development of the resources of the basin (I 43). Of these, two provided substantial flood control benefits, the more important one at Buggs Island, 40 miles upstream from the Roanoke Rapids site here involved, and the less important one at Philpott, on an upstream tributary (I 43). Only these two flood control projects were authorized for Federal construction. Appropriations were made and the work began. But no Federal construction was authorized at Roanoke Rapids, no appropriation was ever considered and no work ever begun. The Commission held that when Congress "approved" the comprehensive plan, it did not intend to withdraw the straight power project at Roanoke Rapids from the Commission's licensing jurisdiction (I 44).

But the Commission went on to consider independently whether the Roanoke Rapids site should be preserved for

exclusive Federal development, as it was authorized to determine by Section 7(b) of the Federal Power Act (I 44). On this issue, the Commission found that the "only public benefit" from developing the Roanoke Rapids site would be the generation of electric power, whether the development be made by the United States or by commercial interests (I 44). It observed that the Congress had not merely refrained from authorizing Federal development of this project; in addition it had been informed of the pendency of the proceedings in the Commission for the issuance of the license here involved but nevertheless had taken no step to authorize Federal construction (I 44). Even beyond the doubtful question whether the Congress would ever wish to authorize such a project, there would be technical difficulties regarding the use of this power by Federal agencies. These principally arose from the water limitations in the Roanoke River which confined the use of any project to a brief period of the day and thus required large steam-electric generation before the energy could meet the needs of a commercial market (I 45).

Commercial development at Roanoke Rapids would not, therefore, conflict with any Federal policy declared for the Roanoke Rapids site. Nor would it conflict with any Federal policy declared in any other part of the Roanoke River basin. Congressional action had been limited to flood control and, as the Commission found,

> "... development of the Roanoke Rapids site for power will neither enhance nor detract from the benefits sought by Congress in this respect." (I 45)

More specifically it found that:

> "The Roanoke Rapids project, either as contemplated by the Applicant or exactly as proposed in House Docu-

ment No. 650, would have no effect (either beneficial or adverse) upon the flood-control plans for the basin." (I 53)

As Buggs Island is independent of Roanoke Rapids, so also the Commission found that Roanoke Rapids is independent of Buggs Island:

> "It is concluded that the proposed Roanoke Rapids project will be fully dependable to 91,000 kw. on the Applicant's anticipated system load under either natural or anticipated, regulated flow conditions (the latter derived from the Army's Definite Project Report), and that the Applicant's proposed project will not, therefore, receive from the Buggs Island project any increase in dependable capacity." (I 62)

The Department of the Army advised, and the Commission found, that the Company's plans were satisfactory with respect to the interests of navigation (I 48). With respect to broader engineering questions, the Department of the Army advised and the Examiner found that:

> "'. . . the Power Company's plan proposed in the amended application is satisfactory for development of the water resources of this reach of the Roanoke River,' . . ." (III 1076)

Concurring in this conclusion, the Commission found that the proposed construction was practical and desirable in the public interest (I 50-66) and would fulfill the policy of the Federal Power Act for

> ". . . prompt development of water resources where such development is feasible and in the public interest, . . ." (I 45)

In conclusion, construction of the Roanoke Rapids project by the Company was found on the facts to be "in harmony with the approved comprehensive plan" of the Congress and indeed to be "best adapted to the Congressionally approved comprehensive plan" (I 68). Conversely the record "does not provide a proper or sufficient basis" for concluding that the project should be undertaken by the United States itself (I 68) and there was no indication that the site would ever be developed by the Federal Government if the Company's application should be denied (I 68). The license was thereupon issued, with suitable conditions as to operating details (I 72-77). The Commission retains jurisdiction to determine, after construction of the facilities, the extent of any benefit to Roanoke Rapids from the Federal project forty miles upstream at Buggs Island and to require the payment of such amounts "for headwater benefits" (I 57) as the Commission may later determine in the exercise of its responsibilities under § 10(f) of the Federal Power Act.

These findings were enlarged into more detailed statements in the underlying Decision (III 1045) and Supplement (III 1107) of the Chief Presiding Examiner. They summarize the arguments repeated here by the Secretary as resting essentially on an assumption that, apart from a license for commercial development, the United States would construct the Roanoke Rapids project "within some reasonable, foreseeable time" (III 1081), but on this question found:

> "The contrary appears to be the fact. The probability is that so far as the United States is concerned, the water resources at Roanoke Rapids are destined to be undeveloped and unutilized for a long time to come. It is not believed that such wastage or nonutilization of water resources can be in the public interest, particu-

larly when there is a need for the energy in the area and a private developer with private capital stands ready, willing and able to utilize them, with the protection of the public interest furnished by the terms and conditions of a Federal license." (III 1081)

SUMMARY OF ARGUMENT

A.

THE COMMISSION'S JURISDICTION TO LICENSE

I.

The Words of the Act

When the Flood Control Act of 1944 provided that the "general plan for the comprehensive development of the Roanoke River Basin . . . is approved" and then went on to provide that "the construction of the Buggs Island Reservoir . ... and the Philpott Reservoir . . . are hereby authorized", it meant something less for the general plan than for the two named reservoirs, otherwise it would not have gone on to deal with them specially and the words in which it did so would be without effect.

When a project is "authorized", the merits are reviewed by a committee with specialized authority in the field and the policy choice is made to establish the Federal purpose. It then remains only to make appropriations after review by another committee with specialized authority on budgetary matters, the Appropriations Committee. This is the only legislative meaning of the word "authorized". Since this was not intended as to the unauthorized projects in the general plan, no specific legislative meaning attaches to the mere "approval" of the general plan as such. But it has important practical consequences. It makes clear the Congressional

judgment that any construction substantially in accordance with the approved plan would not conflict with the authorized construction and thus affords a guide to the exercise of judgment in all subsequent proceedings before the Congress or the Commission.

The Roanoke Rapids site is governed solely by the special provision for the Roanoke River Basin and not by the general introductory words at the beginning of Section 10 of the Act. There is no conflict between the approval of the Roanoke River plan as such and the Commission's continuing power to license commercial developments on navigable streams under Section 4 of the Federal Power Act of 1920. The Commission has found that on the facts there is no inconsistency between construction of the two flood control projects that were authorized at Buggs Island and Philpott by public funds and construction of the straight power project at Roanoke Rapids by commercial funds. So there is no basis, either directly or indirectly, for a repeal by implication.

The Commission thus retained its regular jurisdiction under the Federal Power Act with respect to the Roanoke Rapids site and had the legal power to issue the license here involved.

II.

The Legislative History

A long history of legislation with regard to river surveys and improvements established a fundamental legislative principle, in the years prior to 1920, that no individual project should be permitted without first determining that it was consistent with a comprehensive plan for the maximum development of the resources of the affected basin. (II 2 below.)

This principle is adopted in the Federal Water Power Act of 1920 and implemented with an administrative commission to apply that principle through the continuous exercise of expert judgment. In addition to this choice of method, the Act sought, as a basic policy goal, the stimulation of water power development through commercial capital under public regulation. (II 3 below:)

Later legislation through 1942 has respected and reaffirmed these decisions of fundamental principle. Elaborate engineering studies were authorized to facilitate the determination of the best plans for comprehensive development, whether undertaken by public or commercial funds. A new policy developed in this period was for a nation-wide program of public works to provide flood control where estimated benefits exceed the costs. This was first established as a nation-wide policy by the Flood Control Act of 1936 and was applied in further instances in the Flood Control Acts of 1938 and 1941. But in every instance the Congress, while liberally authorizing dams for flood control purposes or flood control and other purposes, deliberately refused to authorize straight power projects offering no substantial promise of flood control in themselves. By repeated Congressional declaration, these are not a suitable object for public funds. This was a policy choice for the Congress to make. (II 4, below.)

The legislative proceedings on the Flood Control Act of 1944 embody an express reiteration of this Congressional policy in both houses and it is not reasonable to suppose that the Congress would overturn this settled policy without saying so in explicit terms, indeed while protesting its continued adherence to the policy. (II 5, below.)

The Congress was clearly informed during the legislative proceedings of the Flood Control Act of 1950 that in the

view of the Army Engineers a straight power project in a general plan approved by the Congress remained available for commercial development upon being licensed by the Commission and the Congress took no step for any different result, evidently accepting this as the purpose and effect of its 1944 legislation. (II 6, below.)

In sustaining the Commission's power, the Court will thus enforce the Congressional design, while the Secretary's arguments seek to mask, under the language of a liberal construction, the creation of a new policy that the Congress, so far from favoring, deliberately rejected.

B.

The Commission Is Not Barred Under § 7(b)

The Commission did not forfeit its authority to license a hydroelectric development at Roanoke Rapids by concurring in the 1944 recommendation of the general plan for the Roanoke River Basin. The recommendation dealt only with the facilities to be constructed and not with the question of who should construct them. The Commission has found that its 1944 recommendation did not constitute a judgment for construction by the United States itself under Section 7(b).

But even if there had been such a judgment, the Commission has the continuing power and responsibility to exercise an expert judgment on the facts as they evolve. It considered the question anew in this proceeding and concluded that there was no basis for a finding that construction should be undertaken by the United States itself.

The Commission's licensing authority is therefore unimpaired and it had the power to enter the order under review.

C.

The Standing of the Secretary to Sue

The Government agencies entrusted with construction of public projects of this nature have taken no appeal. The Secretary has no interest except to distribute surplus energy from projects operated by the Department of the Army and thus has no concern with the question whether new projects should be constructed. His lack of statutory interest is aggravated in the present case by appearing in this Court without representation by the Department of Justice.

ARGUMENT

A.

The Commission's Jurisdiction to License

I.

The Words of the Act

The words of the Flood Control Act of 1944 do not in terms repeal any portion of the Federal Power Act. Particularly they do not in terms repeal or modify § 4 which, as the licensing provision, is the cornerstone of the regulatory scheme. So much must be admitted.

Yet the Congress well knew how to limit the Commission's authority in express terms when desired. It had expressly prohibited the issuance of licenses by the Commission in various other streams or territories, *e.g.*, the Great Falls of the Potomac River (Act of May 29, 1928, 45 Stat. 1012), national parks and monuments (March 3, 1921, 41 Stat. 1353) and, for a limited time, the Colorado River (December 21, 1928, 45 Stat. 1057, 1062). It still knew how to say this in 1944 and this was an easy thing to say if desired. But it said no such thing in the Flood Control Act of 1944.

All that the Congress said was that "the following works

of improvement . . . are hereby adopted and authorized" and then, speaking specifically of the Roanoke River Basin in the course of a lengthy enumeration of projects throughout the country:

"ROANOKE RIVER BASIN

"The *general plan* for the comprehensive development of the Roanoke River Basin for flood control and other purposes recommended by the Chief of Engineers in House Document Numbered 650. . . *is approved* and *the construction of the Buggs Island Reservoir. . .and the Philpott Reservoir . . .are hereby authorized* substantially in accordance with the recommendations of the Chief of Engineers in that report at an estimated cost of $36,140,000." (§ 10, italics added)

It is implicit in the words that mere approval of a general plan does not involve the authorization of any particular project that it proposes. Otherwise the Congress would not have gone on to authorize Buggs Island and Philpott, for they would have been authorized already by the mere approval of the general plan and the additional words would have been wholly without effect. No dictionary is needed for this interpretation. We may learn from the lips of the Congress. It defined its own terms as it spoke, because statutes are customarily read to give meaning to every word where possible. Thus Mr. Justice Story said for the Court:

". . . it is the duty of the court, when it can, to give effect to every word in every enactment, if it can be done without violating the obvious intention of the legislature." (*The United States* v. *Gooding*, 12 Wheat. 461, 477, 1827)

This has frequently been repeated by the Court:

"The construction contended for would violate the cardinal rule that, if possible, effect shall be given to

every clause and part of a statute." (*Ginsberg & So*
v. Popkin, 285 U. S. 204, 208, 1932)

* * *

". . . all words of a statute are to be taken into accou
and given effect if that can be done consistently wi
the plainly disclosed legislative intent." (*McDonald*
Thompson, 305 U. S. 263, 266, 1938)

Moreover, the two projects that the Congress "autho
ized" are not all that were proposed by the general plan
Plainly, therefore, the Congress did not intend to "autho
ize" the remaining nine. As the court below observed, *Ex*
pressio unius est exclusio alterius (V 34).

So the two projects are "authorized" and the nine ar
something less than authorized. We do not rest this conclu
sion principally on shades of meaning between "approved"
and "authorized" (Secretary's Brief 148-58), though dif
ferences in words are not to be ignored. Rather we look t
an important practical principle in the dispatch of Con
gressional business. It is provided by the Rules of the House
and of the Senate that no appropriation can be considered
except for a project which has first been "authorized" in
point of policy.[2] To be "authorized" by the Congress a
project must be reviewed by the legislative committee having

[2] The House Rule provided then as now that:

"No appropriation shall be reported in any general appropriation
bill, or be in order as an amendment thereto, for any expenditure
not previously authorized by law. . . ." (Rule XXI, Rules of the
House of Representatives, H. R. Doc. No. 812, 77th Cong., 2d
Sess. 384, 1943)

The Senate Rule provided then as now that:

". . . no amendment shall be received to any general appropri-
ation bill the effect of which will be to increase an appropriation
already contained in the bill, or to add a new item of appropri-
ations, unless it be made to carry out the provision of some exist-
ing law. . . ." (Rule XVI, Senate Manual, Sen. Doc. 239, 77th
Cong., 2nd Sess. 20, 1943)

specialized responsibility for the particular subject, in this case the Senate Committee on Commerce and the House Committee on Flood Control (now the Committee on Public Works). When so reviewed and "authorized" by the Congress, the policy decision is made, the Federal purpose is established and it only remains to decide the time and amount of the appropriations after taking into account the competing claims of many different purposes. This is a finance problem for a wholly different committee of experts, the Appropriations Committee. In this way the Rule operates to safeguard the orderly dispatch of Congressional business. As the Senate Committee on Appropriations said in refusing to recommend an appropriation for flood control projects not previously reviewed by the policy committee:

> "The committee does not feel that appropriations should be made in the bill for unauthorized projects." (Sen. Rep. 1167, 80th Cong., 2d Sess. 6, 1948)

The word "authorized", as applied to Buggs Island and Philpott, had this precise operative effect. Thereafter only the appropriation question remained. But this effect did not attach to the other nine projects in the general plan and no appropriation for them could be considered. Since this is the only legislative effect that could follow from the word used for Buggs Island and Philpott and it could not follow from the word used for the other nine in the general plan, it follows that no legislative effect was intended when the "general plan" was merely "approved". That was merely an expression of Congressional judgment of feasibility. It was equivalent to saying: We find the general plan to be, as the Chief Engineer has recommended, "the best plan for the development of the . . . Roanoke River Basin" (I 136) and accordingly we authorize these two projects in the plan that

offer substantial provision for flood control, though we refuse to authorize the straight power projects since we do not think them a suitable purpose for public funds.

By expressing its approval of the general plan it made clear that the authorized construction was in accord with a comprehensive plan. It also made clear that the other projects in the general plan were not in conflict with the authorized, but might be authorized in the future as circumstances might suggest. For the immediate task the Congress would thus be doing no more than it had required of the Commission since 1920 in directing that no project could be licensed unless found to be "best adapted to a comprehensive plan" (§10(a)). For the future task the Congress would thus proclaim its judgment to serve as a guide in all future consideration, whether by the Congress in passing on any future requests or by the Commission in any license proceedings that might be instituted affecting the Roanoke River. The practical usefulness of such a proclamation is attested by the proceedings here under review, for they have been informed and guided throughout by the Congressional judgment so declared. It is by no means "useless" (Secretary's Brief 157) for the Congress to proclaim its judgment, since its judgment is very different in standing and effect from the judgment of the Army Engineers expressed in the "308 Reports".

There is no basis for the Secretary's argument that the Congressional design was "modified" as a result of the Company's application to the Commission (Brief 188). The intensive study of the Roanoke Rapids site in this proceeding led to no conflict with the purpose of the original project, but only a fuller realization of its potentialities, just as the actual construction of Buggs Island by the Army Engineers resulted in a greater capacity than originally planned.

The Army Engineers reported on this point that the project as originally proposed was no longer "economically

justified for private construction" but that the project with the proposed improvements was "economically feasible" (IV 44-45). They further reported that the improved project was satisfactory with respect to the interests of navigation (I 48). The changes embodied in the improved project were not, the Examiner found, of an important nature. His Decision finds:

> "... the Power Company's plan ... varies slightly from the exact plans for the Roanoke Rapids site contained in House Document No. 650. The plans of the Applicant, it is concluded on the whole, represent substantially, the Roanoke Rapids project as described in the House Document 650. Such difference as exists does no violence to the comprehensive plan of the Chief of Engineers as 'approved' by the Congress." (III 1076)

Putting these findings together, the Commission held in its Opinion:

> "Such modifications of the general plan for development of the Roanoke Rapids site as have been proposed by the Applicant have been made necessary by reason of changed physical and economic conditions in the basin since 1944 and represent improvements over the original plan inasmuch as they provide a more complete utilization of the particular water resources at the site. The Applicant's proposed plans have been reviewed by the Corps of Engineers, Department of the Army, and the report of the Chief of Engineers contains a statement that the Applicant's plan is indicated by studies to be satisfactory for development of the water resources of this reach of the Roanoke River. There has been no suggestion made by the Chief of Engineers to the effect that the carrying out of the Applicant's plan would be either inconsistent or incompatible with the over-all basin plan contained in House Document No. 650 which was approved by Congress." (I 67)

It is right, therefore, to say that the Congressional judgment approving the general plan was the cornerstone of the Commission's action in this proceeding.

Returning now to the 1944 Act, we say, in sum, that the Roanoke River paragraph is complete in itself. It delimits with sufficient exactitude the action taken for the two authorized projects, the absence of such action for the remaining nine and their resulting permissive status. This specific provision can not be overridden by the general introductory language several pages earlier at the beginning of § 10 to the effect that "the following works of improvement. . .are hereby adopted and authorized". That had become the customary form of the omnibus River and Harbor Acts when the "following works of improvement" were merely listed below as the subjects of the sentence. It was taken over in the Flood Control Act of 1936, where the "following works of improvement" were likewise merely listed in following items. It was continued as a matter of custom in later Flood Control Acts even though all the items had then come to be expressed in specific provisions that were complete in themselves.

This does not mean that the general introductory language loses all meaning, as the Secretary argues (Brief 163-64). The old words remain operative as to each project which the following paragraphs show that the Congress intended to have that effect, perhaps even as to all projects except where "the following paragraphs" manifest a different intention. We do not need to choose between the two, because the paragraph as to Roanoke River plainly manifests a different intention as to the straight power projects on that stream when it restricts the authorization to the two flood control projects alone. The specific must prevail over the general if the Congressional will is to be respected. Otherwise the Congress will be interpreted to authorize 11 when

it said it authorized only 2. This is never permitted. As the Court has said:

> "It is an old and familiar rule that, 'where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.' *Pretty* v. *Solly*, 26 Beav. 610, *per* Romilly, *M. R.*; *State* v. *Comm'rs of Railroad Taxation*, 37 N. J. Law 228. This rule applies wherever an act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include. Endlich on the Interpretation of Statutes, 560." (*United States* v. *Chase*, 135 U. S. 255, 260, 1890)
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> * * *
>
> "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'" (*MacEvoy* v. *United States*, 322 U. S. 102, 107, 1944)

Since the general introductory words of § 10 stating that specified works are "adopted and authorized" do not, under these rules, apply to the Roanoke Rapids site here involved, there is no basis for the Secretary's argument that, as a result of their applying, certain further consequences follow under the customary proviso in the Flood Control Acts that "the Government shall not be deemed to have entered upon any project . . . until . . . adopted by law". In addition we point out below (II 4(*c*)) that the 1936 proviso has only a restrictive, and not an additive, effect. At this point it is

sufficient to point out that there can be no "entering" without an "adoption". Eleven dams could not be "adopted" under the expression "adopted and authorized" unless eleven were "authorized", and only two were "authorized."

The Roanoke River is, accordingly, governed only by the Roanoke River provision. This provision neither expresses nor requires a repeal of the Commission's licensing authority under §4 of the Federal Power Act. It does no more than declare that the straight power projects designated in the Report of the Chief of Engineers seem desirable and consistent with a plan for the maximum development of the Basin. The Act does not say that the straight power projects shall be constructed at any time. It does not say that, if constructed at any time, they shall be constructed by anyone in particular, whether the Federal Government or other public body or commercial enterprise. Those questions it leaves wholly untouched.

The Court has often emphasized that "Repeals by implication are not favored." (*Federal Trade Commission* v. *A. P. W. Paper Co.*, 328 U. S. 193, 202, 1946). Indeed, they are not tolerated except where absolutely necessary to keep the new law from being frustrated:

> "Repeals by implication are not favored. A law is not to be construed as impliedly repealing a prior law unless no other reasonable construction can be applied." (*United States* v. *Jackson*, 302 U. S. 628, 631, 1938).
>
> * * *
>
> "But it is elementary that repeals by implication are not favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy." (*Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 456-57, 1945)

There is nothing in the 1944 Act to satisfy this drastic test in case of the Roanoke Rapids site. In other situations an inconsistency would arise if three new circumstances should supervene, authorization of a particular project for Federal construction, appropriation of funds for that purpose and inception of the work. The court below had so held in another situation (*Savannah River Electric Co.* v. *Federal Power Commission*, 164 F 2d 408, 4th Cir. 1947). Conceivably the same result might also follow though only the first two of these new circumstances should supervene, that is, authorization of the particular project and appropriation of funds for its construction. But the argument for inconsistency is still weaker where only the first of these steps is taken, that is, authorization of the particular project without any present appropriation. We do not, however, need to face even that question here, because, so far as the Roanoke Rapids site is concerned, there was no authorization at all. Certainly there was no "authorization" in the settled legislative sense of determining the policy and permitting consideration of an appropriation. There is no other sense in which the word could have been used. All that the Congress said as to the Roanoke River was that the project seemed feasible and compatible with maximum development of the Basin. There is, accordingly, no inconsistency between the 1944 action as to the Roanoke Rapids site here involved and the continued operation of the Commission's licensing authority.

It is equally clear that there is no derivative inconsistency from the action taken by the Flood Control Act of 1944 with respect to Buggs Island. Buggs Island was authorized, appropriations were made and construction is now completed. But it is settled by the findings of the Commission, which are not questioned here and are thus conclusive, that there is no interdependency whatever between the two projects. The Buggs Island reservoir is a multi-purpose project

"for the control of floods and for the development of hydro-electric power" with "incidental" benefits for "pollution abatement and low-water regulation" (I 49). But Roanoke Rapids is a straight power project, without any prospect of other public advantage. As the Commission said:

> "The only public benefit to be obtained through development of the Roanoke Rapids site will be through the generation and distribution of electric power, whether that site is developed by the United States or by some other interest." (I 44)

It follows on the facts, as the Commission in terms found, that:

> "Congress has already provided for substantial flood control in the Roanoke River Basin and development of the Roanoke Rapids site for power will neither enhance nor detract from the benefits sought by Congress in this respect." (I 45)

In conclusion, the Commission found, in terms that dispose of this factual issue:

> "The Roanoke Rapids project, either as contemplated by the Applicant or exactly as proposed in House Document No. 650, would have no effect (either beneficial or adverse) upon the flood-control plans for the basin." (I 53)

Affirmatively, the Commission found that ". . . the project proposed is in harmony with the approved comprehensive plan", is "best adapted to the Congressionally approved comprehensive plan" and is " 'best adapted to a comprehensive plan' as that language is used in § 10(a) of the Federal Power Act" (I 68). No question as to these findings was

presented in the Petition on which the writ was granted (pp. 2-3) and the Secretary can not attack them now either directly (Brief 180) or by ignoring them and stating the case in highly colored terms as if the Federal plan were being destroyed and huge values diverted to private interests without payment (Brief 59-60, 122, 180-87, 215).

The Secretary's whole argument that "net power benefits" to the United States of $1,500,000 a year are being diverted to private interests (Brief 118-23, 187, 214-16) is nothing less than an effort to reexamine the administrative issues here. That figure measures nothing but the steam power cost of power equal to that which the Government might produce by an investment at Roanoke Rapids which the Congress has never seen fit to make. Aside from this, in the case of a straight power project, there is no financial benefit except the value of the power to be generated. The calculations as to benefits in House Document No. 650 are based entirely on the estimated cost of generating the same power by steam facilities, without inquiry how the power would be sold.[3] But the Commission found that the Roanoke Rapids power could not be used to meet customer needs except by a system with large steam generating capacity (I 45), which is not in contemplation by the United States. On the other hand, the Commission found that the entire capacity of Roanoke Rapids could be utilized by the Company, at various positions in its load curve, whatever the stream flow might prove to be, and

[3] The Secretary calculates "net benefits" from Federal development after operating charges which make no provision for taxes and assume no return on capital except at an over-all average rate of 2% (Secretary's Brief 103, 215-16; I 158, 162-3, 223). By this means he would make Federal development seem more advantageous than commercial development in every instance. But all these arguments on the facts were made to the Commission and concluded by its findings.

> ". . . the Applicant's proposed project will not, therefore, receive from the Buggs Island project any increase in dependable capacity." (I 62)

The only benefit that the Roanoke Rapids project would receive from the upstream reservoir at Buggs Island would, through regulation of stream flow, be an increase from the 275 million kwh average annual energy on the basis of unregulated stream flow to 345 million kwh on the basis of storage regulation at Buggs Island (I 56). This 70 million kwh of additional average annual energy is not firm energy to be paid for at the high rates applicable to that class of energy as the Secretary argues (Brief 120-21), but available only as stream flow may permit. So the Commission found that this energy would cost $250,000 if obtained from a steam plant (I 56). In consequence a payment by the Company to the United States "for headwater benefits actually conferred . . . could not equitably exceed, on the average, $250,000 annually" (I 56), though the assessment of headwater benefits could not be accurately ascertained until the project should have been in operation for some period of actual experience (I 57).

The Secretary may not ask this Court to decide the legal question of Commission power on a factual premise which is the opposite of the Commission's finding (Brief 59-60, 179-87). That whole line of argument on the facts is beyond the issues of the case. The same comments apply to his related contention that the excess of estimated benefits over estimated costs in the case of the Roanoke Rapids development links it inseparably with all other projects proposed in the general plan, some of which would involve costs in excess of benefits (Secretary's Brief 103, 119-123, 173, 215). The Congress has never authorized a straight power project and it is not to be supposed that it would ever author-

ize a straight power project which would cost more than the benefits produced. It is sufficient that the Commission has found that the straight power project at Roanoke Rapids "would have no effect (either beneficial or adverse) upon the flood-control plans for the basin" (I 53). Flood control was the Congressional objective when it authorized Buggs Island and Philpott. The Congress divided the general plan into two parts when it authorized the flood control projects but refused to authorize the straight power projects. The two were not made one by the circumstance that some of the straight power projects were eventual long-range possibilities for maximum development of the Basin under changed economic conditions, though presently unremunerative or marginal and thus improbable of execution, as the Army Engineers have recognized.[4] It takes more than a deficit to make a "single package".

Thus it is conclusively established on the facts that the Federal purpose embodied in the Buggs Island project will in no sense be restricted or impeded by the regular exercise of the Commission's licensing jurisdiction to permit the development of Roanoke Rapids by commercial capital. There is, in a word, no "repugnancy" between the 1944 action as to Buggs Island and the continued operation of Section 4 of the Federal Power Act of 1920 as to the Roanoke Rapids site. On no ground, therefore, can there be spelled out a repeal by implication.

In sum, the words of the 1944 Act are clear that the Commission's regular licensing authority under Section 4 of the Federal Power Act survives as to Roanoke Rapids. This is all that need be determined in order to affirm the judgment below. Words are, of course, the strongest vehicles of meaning, so much so that the Court has sometimes said

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[4] Hearings on H. R. 5472 (Title II), 81st Cong., 1st Sess., 143-44, 1949.

"We are not at liberty to construe language so plain as to need no construction. . . ." (*Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, 89, 1935)

But were there need to probe behind the words of the Act into their historical context, this same conclusion is even more strongly confirmed, as we now proceed to show.

II.

The Legislative History

1.

Introduction

As the national importance of interstate commerce was one of the principal reasons for the establishment of the Federal Government, so it has been a principal object of Congressional attention through the years. In particular, this attention has been focused on the protection and development of navigable streams. From this extensive history we now select the episodes that supply perspective and illumination for the Flood Control Act of 1944.

Two important policies will emerge from this review, one of governmental method, the other of substantive goal. As for method, it has been an established Congressional policy for nearly half a century that the authorization for any particular hydroelectric project must be in accord with a comprehensive plan for the most effective utilization of the resources of the entire basin and that continuous administrative judgment is the most effective means of applying that standard. The substantial goal that has evolved through the years is to stimulate and regulate the development of hydroelectric projects by commercial capital but to carry out flood control developments by public funds, including multipurpose dams for flood control, navigation and power, though not any straight power projects. From these two

policies it will result that the Congress could not have intended to freeze the Roanoke Rapids site against hydroelectric development by commercial capital when permitted by the administrative judgment of the Federal Power Commission in accord with a comprehensive plan, since the Roanoke Rapids site has always been recognized, before the Congress and elsewhere, as a straight power project with no contribution whatever to flood control.

2.

The Early Years Until 1917

River surveys and improvements have been a constant Congressional concern. Beginning with the River and Harbor Act of May 20, 1826 (4 Stat. 175), a succession of nearly 100 omnibus acts have entrusted these projects to the Corps of Engineers of the United States Army. In large measure this early legislation was concerned with obstructions to navigation. For example, the River and Harbor Act of 1890 laid down a general prohibition against creating any obstruction in navigable waters unless authorized by law (September 19, 1890, §10; 26 Stat. 426, 454). Specifically with regard to dams, the River and Harbor Act of 1899 prohibited the construction of any dam or bridge in any navigable river until the consent of Congress should have been given and the plans approved by the Chief of Engineers and the Secretary of War (March 3, 1899, §9; 30 Stat. 1121, 1151).

It was about this time that the electric industry began to demonstrate its commercial possibilities. Permission for hydroelectric installations was soon sought from the Congress. This was on an individual case basis, like the early legislation granting corporate charters. But the importance of more systematic consideration was soon appreciated. In

1907 President Theodore Roosevelt appointed an Inland Waterways Commission for the purpose of assuring more systematic appraisal (Sen. Doc. No. 325, 60th Cong., 1st Sess., 1908). In vetoing the Rainy River Bill of 1908, he said:

> "It should also be the duty of some designated official to see to it that in approving the plans the maximum development of the navigation and power is assured, or at least that in making the plans these may not be so developed as ultimately to interfere with the better utilization of the water or complete development of the power." (42 Cong. Rec. 4698, 1908)

In 1909 a report of the National Conservation Commission stressed the importance of maximum over-all development "extending to all uses of the waters" (Sen. Doc. 676, 60th Cong., 2d Sess. 1, 1909).

Acting on this principle in 1910 the Congress attempted to establish a general regulatory scheme when it rewrote the General Dam Act of 1906.[5] The amended act provided that no construction of any water power dam should be begun, whether previously or subsequently authorized by the Congress or any Federal official, until the plans should have been approved by the Chief of Engineers and the Secretary of War and that in reviewing plans they should:

> ". . . consider the bearing of said structure upon a comprehensive plan for the improvement of the waterway . . . with a view to the promotion of its navigable quality and for the full development of water power. . ."

This has remained a cornerstone of Congressional policy through the long years that have ensued. But it was not

[5] June 21, 1906, 34 Stat. 386; June 23, 1910, 36 Stat. 593.

at first fully honored in actual practice. The actual grants of licenses continued under special legislation without apparent regard to the interests of comprehensive planning (see *First Annual Report of the Federal Power Commission*, pp. 48-49, 1921). Expert recommendations continued to multiply, however, in support of comprehensive planning (*e.g.*, Final Report of the National Waterways Commission, Sen. Doc. 469, 62d Cong., 2d Sess., 1912). For several years the Congress struggled over the problem of establishing the best regulatory provision. Various bills were proposed, debated and rejected.[6] While this preliminary period did not itself yield a complete regulatory scheme, it can be said to have established comprehensive planning as the criterion of all subsequent regulation. This may be evidenced by this general and important requirement in the River and Harbor Act of 1917 (March 1, 1917, § 3; 39 Stat. 948, 950):

> "All examinations and surveys of projects relating to flood control shall include a comprehensive study of the watershed or watersheds, and the report thereon in addition to any other matter upon which a report is required shall give such data as it may be practicable to secure in regard to (a) the extent and character of the area to be affected by the proposed improvement; (b) the probable effect upon any navigable water or waterway; (c) the possible economical development and utilization of water power; and (d) such other uses as may be properly related to or coordinated with the project."

The legislation of this period looked mainly to the protection of navigation. But there had been developing, at

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[6] Adamson Bill (H. R. 16053, 63rd Cong., 2d Sess., 1914); Ferris Bill (H. R. 16673, 63rd Cong., 2d Sess., 1914); Shields Bill (S. 1419, 65th Cong., 1st Sess., 1917); Myers Bill (S. 2399, 65th Cong., 1st Sess., 1917).

least in regard to the great watershed of the Mississippi River, a further policy of flood control, which was to assume greater importance in later years. As early as 1874 the Congress had provided for the preparation of a flood plan for the Mississippi (June 22, 1874; 18 Stat. 199) and in 1879 it had established the Mississippi River Commission (June 28, 1879; 21 Stat. 37). While there were no appropriations before 1890 for improvements in the Mississippi except in the interests of navigation, later appropriations looked also to the control of floods. The major floods of 1915 and 1916 on the Mississippi resulted in substantial appropriations for flood control in this river in the River and Harbor Act of 1917 (March 1, 1917; 39 Stat. 948). The policy of flood control, at this point, may be said to have been established but localized.

3.

The Federal Water Power Act of 1920

These long discussions in the Congress culminated in the Federal Water Power Act of June 10, 1920 (41 Stat. 1063). This created a permanent Commission of three members, the Secretary of War, the Secretary of the Interior and the Secretary of Agriculture. Its purpose, as stated in the title of the Act, was "to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto. . .". These ends were to be achieved through a broad policy of encouraging the development of water power resources by commercial capital under public regulation with a program for eventual public ownership of the particular project. The Commission was, however, empowered, as the guardian of the public interest in the national water power resources, to set apart particular projects for development solely by the United States if of the view that this would be better in the circumstances.

The text of the Act authorized the Commission:

> "To issue licenses . . . for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the navigable waters of the United States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided . . . : *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War." (now §4(e))

But it was required that all licenses be on condition, among others,

> "That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the commission will be best adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation, of water-power development, and of other beneficial public uses. . ." (§10(a)).[7]

[7] Minor differences of phraseology, which are without significance for present purposes, were made by the Public Utility Act of 1935, which is considered below. As so amended this section now reads as follows:

> "That the project adopted, including the maps, plans and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; . . ." (16 U. S. C. §803(a))

On the other hand the Commission could recommend for exclusive Federal development under the provision:

> "That whenever, in the judgment of the commission, the development of any project should be undertaken by the United States itself, the commission shall not approve any application for such project by any citizen, association, corporation, State, or municipality, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the project as it may deem necessary, and shall submit its findings to Congress with such recommendations as it may deem appropriate concerning the construction of such project . . : by the United States. . :". (§7)

The keynote of this important legislation was that the Congress would no longer grant licenses by special acts for individual cases. Rather it would look to a comprehensive development of national resources. Primarily this was to be achieved by attracting commercial capital, though supervising each step of the investment and operation and providing for acquisition by the Government at the end of the license period. The administration of this national policy was to be entrusted to the continuous attention of an expert commission. These purposes were more fully safeguarded by an amendment of June 23, 1930, by which the cabinet officers, with their multiple responsibilities, who previously constituted the Commission, were removed and five independent full time Commissioners substituted for them (46 Stat. 797, 16 U. S. C. §792).

This Court has noted the importance of the Act as an establishment of national power policy:

> "It was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote

the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted.

"It was a major undertaking involving a major change of national policy." (*First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U. S. 152, 180, 1946)

The comprehensive development of national resources so to be obtained was to be primarily through stimulating and regulating the investment of commercial capital. At the time of its consideration this was emphasized as the basis of the bill. Thus the Senate Committee on Commerce reported:

"We should do one of two things: We should pass legislation which will lead private capital and enterprise to develop these resources under such regulations as will give consumers good service and cheap power, or the Government itself should proceed to make this development. *This bill proceeds on the theory of private development* with ultimate public ownership possible." (Sen. Rep. No. 180, 66th Cong., 1st Sess. 3, 1919; italics added.)

By way of recent summary, we may quote from the Report of the President's Water Resources Policy Commission (1950, Vol. 3, p. 272):

". . . Congress until 1920 generally gave direct legislative authorization on a project-by-project basis for nonfederal development of power on streams under its jurisdiction. Restrictive conditions in grants were few and inconsistent. And many of the grants were perpetual in their terms. With rare exception, they included no provision for imposition of a charge for the privilege itself, or for disposition of properties. But

with the uncertainty of a grantee's tenure and investment under grants subject to termination, private development had moved slowly.

"Seeking to remedy this situation, Congress in 1920 passed the Federal Water Power Act, regularizing and facilitating federal permission for nonfederal development through a licensing system. The Act's history reflects a *legislative purpose to encourage nonfederal development while safeguarding the public interest and making possible ultimate public ownership.* And as we shall see, the Act itself reserves a right to ultimate public ownership of licensed projects and also holds the door open to direct federal development by prohibiting the issuance of licenses whenever the Federal Power Commission determines that development should be undertaken by the United States." (Italics added.)

This legislation established the regulatory scheme. It involved a major policy choice of method (comprehensive development under administrative supervision) and a major policy choice of objective (development of power by commercial capital). In ensuing legislation we will now trace the development of flood control, the other objective referred to above.

4.

Subsequent Legislation Through 1942

(a) *The General Studies.*

Omnibus River and Harbor Acts have, as indicated above, been of almost annual occurrence since 1826. But the first of direct pertinence here was the River and Harbor Act of 1925 (43 Stat. 1186, 1190). This opened an important chapter in the history of water power development by directing the Secretary of War (through the Corps of Engineers of the United States Army) and the Federal Power Commis-

sion to prepare an estimate of how much it would cost to make an investigation and report covering every navigable stream in the United States where power development seemed practicable. This was to be done

> ". . . with a view to the formulation of general plans for the most effective improvement of such streams for the purposes of navigation and the prosecution of such improvement in combination with the most efficient development of the potential water power, the control of floods and the needs of irrigation. . ." (§3)

In obedience to this command the Secretary of War, at that time *ex officio* the Chairman of the Federal Power Commission, reported in the next year on the cost of such an investigation. The report was printed as H. R. Document No. 308 (69th Cong., 1st Sess., 1926). This name became famous when Congress directed studies to be made on that basis. The subsequent reports that came in through the years from all parts of the nation were known as "308 Reports".

In recommending that such investigations be authorized, the Secretary of War pointed out that they would be useful for any improvement however undertaken, whether by the United States or by commercial capital, and would be of aid to the Commission in the exercise of its licensing responsibility:

> "There are evidently two principal purposes for which investigations of this nature would be useful; either for the preparation of plans for improvement to be undertaken by the Federal Government alone or in connection with private enterprise, or to secure adequate data to insure that waterway developments by private enterprise would fit into a general plan for the full utilization of the water resources of a stream." (p. 4)

* * *

"Improvements for the development of water power are, of course, under the Federal Power Commission and can be controlled by the Government only when they affect navigation directly or indirectly. In such cases the Federal Power Commission must determine whether or not the proposed projects are adapted to a comprehensive development of the stream affected. In many instances data required to be obtained under the provisions of preliminary permits can be made to serve this purpose, but to permit the commission to reach correct decisions in some cases special investigations are necessary." (p. 5)

* * *

"A continuation of these activities of the Geological Survey is desirable, and if they are carried on at a reasonable rate with due regard to the needs of the immediate future, when supplemented by special investigations under the legislation suggested above, they will supply the specific data needed to permit accurate determination of the advisability of development on waterways by private interests, and expensive general surveys are, therefore, not considered necessary for this purpose." (p. 5)

It was clearly recognized that the proposed investigations did not contemplate any change in the national power policy declared in the Federal Power Act. The streams of the United States were divided into three classes: (*a*) those where the benefits to navigation "justify the Federal Government in sharing in the cost"; (*b*) those where power development would be "of considerable benefit to navigation but not sufficient . . . to warrant large expenditures by the Federal Government"; and (*c*) those where the benefits of navigation "would be insignificant" (p. 2). Power development as such was left to commercial capital, while the interests of the Federal Government were defined in terms of navigation,

flood control and irrigation as we may see from this concluding recommendation of the Report:

> "Investigations of the type for which estimates are submitted should therefore, it is believed, be first given to streams on which it appears there is a possibility of the Federal Government's undertaking either alone or in connection with private interests, construction work for the improvement of the stream. These surveys should evidently be made by the agencies which are to be entrusted with the construction work; in the case of navigation and flood control the War Department, and in the case of irrigation projects the Department of the Interior. Judging from past experience of this department, it may be that where a combined power and navigation project appears feasible, there is a very fair possibility that the investigations of the power values and possibilities may in many cases be obtained without cost on the part of the United States by private interests interested in securing the power." (pp. 5-6)

The Report listed for survey the major rivers of the nation, including the Roanoke.

This formulation of Congressional policy was given express approval by the River and Harbor Act of 1927 (44 Stat. 1010) when it directed that surveys be made "in accordance with House Document 308, 69th Cong., 1st Sess." This had the effect of making specifically applicable to the Roanoke River study all the principles declared in House Document 308.

The studies were not immediately optimistic so far as the Roanoke River was concerned. The Army Engineers (H. R. Doc. 65, 74th Cong., 1st Sess., 1935) advised against any present development on the Roanoke River, though describing the projects as worthy of future consideration. For the general scene we may note that the Army Engineers reported on an aggregate of some 200 river

basins, substantially covering the nation. (Hearings before Senate Committee on Commerce on H. R. 8455, 74th Cong., 2d Sess. 2-4, 1936). These were not submitted as recommendations for construction, but only as opinions on what was "physically the best use of the water" (*id.*, pp. 190, 192).

(*b*) *The Public Utility Act of 1935.*

One of the outstanding events in the notable legislative period of the 'Thirties was the enactment of the Public Utility Act of 1935. It was the subject of hearings before committees both in the Senate and in the House and was debated at length on the floor. The controversy turned, however, for the most part around the treatment of public utility holding companies, dealt with in Title I of the Act, and there was no difference of view on the decision to retain unaltered the basic policy provisions of the Federal Water Power Act, which became Part I of Title II. No amendments were made to this legislation except those:

> ". . . requested by the Federal Power Commission on the basis of its experience in the administration of that act. Most of them are designed merely to clarify the act in its application to situations that have arisen in its administration." (Sen. Rep. No. 621, 74th Cong., 1st Sess. 17, 1935; and see H. R. Rep. No. 1318, 74th Cong. 1st Sess. 7, 24, 1935)

The name Federal Water Power Act was changed to Federal Power Act and a new Part II was added to authorize regulation of interstate electric utilities even though not licensees under Part I, covering rates, services, consolidation, issuance of securities and other customary subjects. There was also added a new Part III, applicable to licensees as well as interstate utilities, covering accounts, reports and other matters. For present purposes, the material circum-

stance is that, after this exhaustive reconsideration, no changes were made in the basic policy of the licensing provisions in Sections 4 and 10. Rather it was retained and strengthened by enlarging the regulatory machinery for its enforcement.

(c) *The Flood Control Act of 1936.*

The next important event came in the following year. In the Flood Control Act of 1936 the Congress undertook for the first time to establish a nation-wide policy for flood control. As we have seen, this purpose had engaged Congressional attention from time to time in particular basins and had been mentioned in the 1925 Act as one of the reasons for the general surveys, but now for the first time the Congress declared on a nation-wide basis that

> ". . . the Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes if the benefits to whomsoever they may accrue are in excess of the estimated costs . . ." (§ 1)

As the Senate Committee said, the bill

> ". . . represents the first comprehensive effort definitely to establish a Federal policy with respect to flood control throughout the United States, and contains the first general legislation having this purpose in view." (Sen. Rep. No. 1963, 74th Cong., 2d Sess. 1, 1936)

But this was by no means a proclamation appropriating for exclusive Federal development every navigable stream in the United States with its tributaries and watersheds. To caution against so mistaken a view, the Congress was careful to emphasize that:

". . . the Government shall not be deemed to have entered upon any project for the improvement of any waterway mentioned in this Act until the project for the proposed work shall have been adopted by law:" (§6)[8]

The Secretary attempts to fit these words of the 1936 Act into the general introductory words "adopted and authorized" in §10 of the 1944 Act, which Point I above shows to be inapplicable to Roanoke Rapids. His theory is that, if Roanoke Rapids can be brought within the general words so as to be deemed "adopted" under those general words, then the Government would be deemed "to have entered upon" the Roanoke Rapids project. But the court below was plainly right in holding that this 1936 proviso was intended only as a disclaimer and was not intended to have any affirmative operation 8 years later so as to give authorization to projects not expressed as authorized (V 38). This is not a narrow or technical question of words. The Congress meant only to say that the authorization of preliminary engineering studies to guide future legislative judgment did not involve a policy choice whether or not to proceed with any particular project. Assent of the legislative committee having specialized supervision over the field would still be necessary as a condition precedent to any appropriation toward construction.

Anticipating briefly, we may note that similar provisions were included in the subsequent Flood Control Acts, including the Flood Control Act of 1944 (dealt with in 5 below). But in each instance the proviso was a disclaimer of any implication of authorization from the mere fact of permitting preliminary studies. In the same way the proviso in §11 of the Flood Control Act of 1944 relates only to the

[8] This had become established as a customary proviso in the survey authorizations granted by the successive River and Harbor Acts.

new "preliminary examinations and surveys" authorized by that Section, and has no application at all to the "works of improvement" dealt with in § 10.

The legislative proceedings on the 1936 Act make it clear that the flood control program contemplated by the Act did not include the construction of any straight power projects by the Federal Government. Thus the Senate Committee reported:

> "The Committee found it advisable to exclude from the bill certain reservoirs included in H. R. 3455 most of which are associated with power development, since the inclusion of such reservoirs in a bill devoted to flood-control measures would not appear appropriate." (S. Rep. 1963, 74th Cong., 2d Sess. 2, 1936)

The Secretary argues here that the Flood Control Act of 1936 marked the establishment of a "new policy" (Brief 3). And so it did, but only a policy for more flood control and not a policy for Federal development of straight power projects. So much is clear from the legislative record. Once that is recognized, it is academic whether the policy be new or not, since in any event it does not apply to Roanoke Rapids which is nothing but a straight power project and, whether constructed by public or commercial funds, will have no effect at all on the multi-purpose dams that have been built at Buggs Island and Philpott.[9]

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[9] A principal task facing the Congress at the time of establishing a national flood control policy in 1936 was to decide the general plan of cost distribution between the Federal Government and the localities. The Congress laid down a general plan for the Federal Government to bear the construction cost and the localities to bear the land cost. Subsequently land costs were absorbed by the Federal Government for reservoirs. The importance attached to the decision for the Federal Government to bear the major portion of the expense in flood control gives further emphasis to the fact that the Congress has deliberately refused to authorize Federal construction of straight power projects.

All this is indicated by the text of the Act. So far as the Roanoke River is concerned, the Act did nothing except to direct the Secretary of War to

> ". . . *continue* surveys, studies, and reports at the following-named localities [including Roanoke River], where, according to the surveys and estimates already made, opportunities appear to exist for useful flood-control operations with economical development of hydroelectric power. . ." (§7; italics added)

This was no break with history. The Secretary of War, as the officer in charge of the Army Engineers, had been investigating all the navigable streams of the United States since the command of Congress in the River and Harbor Act of 1927. He was now directed to "continue" his investigations at the same places where preliminary studies had already been made, including specifically the Roanoke River. He was not directed to "discontinue" the preliminary studies or to apply any novel standards not already adopted by the Congressional command of 1927 that the engineering investigations proceed "in accordance with" House Document No. 308. No new policy appears, as the Secretary would have it seem, in the general direction of §2 that "Federal investigations and improvements of rivers and other waterways for flood control and allied purposes" should be conducted "under the direction of the Secretary of War and supervision of the Chief of Engineers". That had been custom through a century for navigation purposes. Designation of the same agency to supervise such flood control works as the Congress might thereafter authorize for Federal construction is not a policy choice of what projects should be authorized for Federal construction. The Congress retained the power of choice upon specific projects after the reports of the required investigation

should have been made. All this is practical and simple. It contains nothing to suggest a repudiation of the national power policy that had just been reaffirmed by that same Congress a few months before in the Federal Power Act of 1935.

(d) The Flood Control Acts of 1938 and 1941.

The Flood Control Act of 1938 (52 Stat. 1215) is another step within the same statutory frame. Additional projects were authorized (§4) and the Secretary of War was directed "to cause preliminary examinations and surveys for flood control" to be made on various additional streams, including the Smith River, a tributary of the Roanoke (including the site of the Philpott Dam). But this was merely the addition of instances. No new policy was established, either for procedure or for objective. The Congress was again careful, in authorizing these investigations, to repeat its customary disclaimer, that:

> ". . . the Government shall not be deemed to have entered upon any project for the improvement of any waterway mentioned in this Act until the project for the proposed work shall have been adopted by law: . . .". (§6)

Moreover, the same limitation as in 1936 was scrupulously observed by which the Federal policy is exerted for flood control, whether or not accompanied by multi-purpose uses (like the generation of electric energy), but stops short of the straight power project. Thus the House Committee on Flood Control reported:

> "The bill represents a truly comprehensive effort definitely to meet the widespread public demand for effec-

tive *flood control* throughout the United States, and it contains general legislation having *this purpose in view* . . .

"The bill is thus an enlargement and expansion of the policy and of the program adopted in 1936. The problem of flood control is attacked on all fronts. Flood walls and river walls are authorized for priority and emergency control; reservoirs on the tributaries are authorized to detain the waters at their source. Wherever power can be developed in these reservoirs, as in the case of the act of 1936, provision is made for such power. *All reservoirs heretofore adopted and all reservoirs authorized in the pending bill provide primarily for flood control.* Only two of the dams in the bill provide for the development of power. These are the Denison on the Red River, which is primarily for flood control, but in accordance with the policy where power and flood control can be combined, provision is made for power at the Denison dam along the Red River. Four States are affected. The other multiple reservoir which provides for both flood control and power is on the New River in West Virginia and known as the Bluestone Reservoir. . . ." (Italics added; H. R. Rep. No. 2353, 75th Cong., 3d Sess. 1, 5-6, 1938)

The Flood Control Act of 1941 is of similar nature. The additional projects authorized by it were on the premise that:

"Many of the best potential uses of water resources are beyond the ability of private financing. Flood control, irrigation, and navigation projects, including power development, are unsuitable for private enterprise. *These works must be constructed by the Government.*" (Italics added; H. R. Rep. No. 759, 77th Cong., 1st Sess. 5, 1941).

(e) *Summary.*

From this review it is apparent that in the 16 years since the 1925 Act, during all of which the Congress had been concerned with improvements to navigation and flood control, the Congressional policy had been fixed at a point to embrace the eventual development of all projects throughout the country that would justify their cost by benefits to navigation and flood control, with or without other benefits in combination, but to exclude any straight power project. This boundary of the Congressional will was given weight by this Court in sustaining Federal construction of the Denison Dam mentioned in the second previous quotation:

> "Floods pay no respect to state lines." (*Oklahoma* ex rel. *Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508, 521, 1941)
>
> * * *
>
> "While this reservoir is a multiple-purpose project, it is basically one for flood control. . . . Furthermore, it is plain from the Report that the construction of the project so as to accommodate power will increase or augment some of the flood-control benefits, including river flow, which would accrue were the dam to be erected for flood control only." (529)
>
> * * *
>
> ". . . the fact that ends other than flood control will also be served, or that flood control may be relatively of lesser importance, does not invalidate the exercise of the authority conferred on Congress." (534-35)

It was in this historical background that the Congress enacted its next Flood Control Act, that of 1944, on which the Secretary's brief here mainly rests his case. Before turning to it we note only that a further study and report on the possibilities of the Roanoke River were requested by the

House Committee on Flood Control on August 28, 1940, and by the House Committee on Rivers and Harbors on January 26, 1942 (IV 26).

5.

The Flood Control Act of 1944

The supplemental study on the Roanoke River was given the House by the Secretary of War on May 30, 1944 (H. R. Doc. No. 650, 78th Cong., 2d Sess.; IV 26, I 135). This was in compliance with the committee requests just noted and in fulfillment of the direction of the Flood Control Act of 1936 to continue surveys for a further "308 Report" on the Roanoke River.

The new Report contains an elaborate examination of the whole watershed of the Roanoke and Smith Rivers. It considers all possibilities of development. The "ultimate comprehensive development" analyzed in the Report "would include 11 projects" (I 164). Of these, the Report says that the "Buggs Island project" on the Roanoke River "would eliminate over 90 percent of the average annual flood losses in the lower part of the Roanoke River Valley. . ." (I 168). The Philpott project, the Report continues (I 170), would "provide flood protection by eliminating about 97 percent of the total average annual flood losses along the entire Smith River." (I 172) In summary, the Report adds:

> "The Buggs Island and Philpott projects would provide practically all the flood-control features included in the final plan of development." (I 176)

Most of the remaining "projects" were shown by the Report to be straight power projects, with no contribution to flood control. Specifically, this was the case for the Roanoke

Rapids site here in issue.[10] The Board of Engineers accordingly recommended improvement of the Roanoke River "generally in accordance with the plans of the district engineer . . . , the initial step to consist of the construction of dams and hydroelectric power plants at Buggs Island and Philpott" (I 150). The Federal Power Commission

> ". . . concurs in the conclusion of the Board of Engineers for Rivers and Harbors that the comprehensive development of the Roanoke River Basin, in general accordance with the plans prepared therefor by the district engineer consisting of 11 dam and reservoir projects with power, is desirable and that the Buggs Island and Philpott projects would constitute a desirable initial step in the development of the Roanoke River Basin." (I 142)

This is not a statement that construction by the Federal Government is desirable, but only that the maximum potentialities of the basin would be realized through the construction of such facilities, by whomever constructed. On this basis the Chief of Engineers recommended that

> ". . . the general plan of development outlined in the report of the district engineer be adopted as the basis for improvement, step by step, of Roanoke River and tributaries for flood control, navigation, and other purposes, and that the Buggs Island and Philpott projects be authorized for construction as the initial step, generally

[10] Thus the table at I 144-45 shows the "Flood-control benefits" from Roanoke Rapids as zero. The table at I 154 shows the "flood storage reservation" at Roanoke Rapids as zero. The table at I 158 shows the "Annual benefits From flood control" at Roanoke Rapids as zero. The text at I 164 refers to Buggs Island and Philpott as "multiple-purpose reservoirs", but describes Roanoke Rapids as being "for power production". Minor benefits for flood control were indicated from Smith Mountain and Stuart, but none for any of the others except Buggs Island and Philpott (I 158).

> in accordance with the plans of the district engineer and my comments herein and with modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable, . . ." (I 137-8)

The Secretary of War recommended only that

> ". . . if the improvements are authorized, initiation of construction thereon should be deferred until after the war." (IV 20)

The only improvements which the Report recommended to be authorized were the multi-purpose projects at Buggs Island and Philpott. In making this recommendation the Report was in accord with the established Congressional policy to proceed with flood control developments that appeared to promise benefits exceeding cost. But the Report did not call for reexamination of the declared Congressional policy against public construction of straight power projects and did not recommend that any such project be authorized. None of the other projects offered promise of any substantial flood control benefits[11] and in particular the Roanoke Rapids project offered no promise of any such benefits at all.[12] In a word, the Report proposed only another step in the fulfillment of established policy, but not any alteration in the policy itself.

This was plainly the understanding of the Congress in the legislative proceedings. Thus in the hearings before the Senate Committee on Commerce a question from the Chairman of the Subcommittee was answered as follows by the spokesman for the Army Engineers:

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[11] The Smith Mountain project promised a small amount and in consequence was later brought up for special consideration in 1949 but rejected (6 below). The Stuart contribution was negligible.

[12] See the second preceding footnote.

"Senator Overton—Are those the only two reservoirs that are recommended to be authorized in this bill?

"Col. Goethals—Those are the only two recommended to be authorized in this bill. The report recommends that Congress approve the general plan of development, but at this time authorize only those two reservoirs in the amounts stated." (Hearings before a Subcommittee of the Senate Committee on Commerce on H. R. 4485, 78th Cong., 2nd Sess. 24, 1944)

On this basis the Senate Committee Report

". . . recommends approval of the comprehensive plan and authorization for construction of the Buggs Island and Philpott reservoirs in accordance with the recommendations of the Chief of Engineers." (S. Rep. No. 1030, 78th Cong., 2d Sess. 8, 1944)

On the floor Senator Overton, dealing with the allocation of flood control projects to the supervision of the Army and irrigation projects to the supervision of the Department of the Interior, pointed out that nothing but flood control projects were authorized by the bill, saying:

"*. . . there are no projects in this bill proposed to be constructed by the Army engineers in which the interests of flood control do not predominate, . . .*" (90 Cong. Rec. 8625, 1944, italics added)

On the specific issue, Senator Barkley had said on the floor:

". . . there is nothing inconsistent between the Federal Power Act and the various annual appropriations by Congress for the improvement of rivers and harbors, or even flood control." (90 Cong. Rec. 8254, 1944)

The remarks of Senator Overton and Senator Barkley were made after the bill had been amended in the Senate to include the Roanoke River plan. They were addressed, therefore, to the Roanoke River plan among others. While the debate in the House preceded the Senate amendment by which the Roanoke River plan was added to the bill, because the report of the Army Engineers had not become available at that time, the House was no less categorically reassured on this important legislative principle. Thus in presenting the bill on the floor of the House, the Chairman of the Committee on Public Works said:

> "Many projects have been proposed under the guise of public works, but every proposal should be studied and tested. *They should meet the requirements of sound public works.* First, the project should have practical utility. Second, it should be economically sound. *Third, it should be of the type that cannot compete with any facilities that can be provided through private enterprise.* Federal public works should not conflict with private works and local public works. . ." (90 Cong. Rec. 4122, 1944; III 1117; italics added)

> ". . . no power project is authorized in the bill." (90 Cong. Rec. 4199, 1944)

> Mr. Whittington: ". . . *we have repeatedly stated during the debate that no project, reservoir or dam, or other improvement is embraced in this bill unless it is primarily for flood control.* If power can be developed as an incident, or if reclamation can be provided, they are cared for in the bill." (90 Cong. Rec. 4199, 1944; italics added)

> Mr. Whittington . . .
>
> "Under leave to extend, as I stated, none of the dams authorized in the pending bill provide primarily for the

generation and distribution of power. The dominant interest in all of the dams is flood control." (90 Cong. Rec. 4202, 1944)

In this legislative context there can be no doubt that in providing that the "general plan" for the Roanoke River Basin is "approved" and the construction of Buggs Island and Philpott is "authorized", §10 of the Flood Control Act of 1944 could not have been designed to countenance any violation of the Congressional policy against the construction of straight power projects by public funds. The words have been sufficiently analyzed in I above. At this point we look only to the historical context to identify the policies that were to be promoted by the bill. So far from repudiating the repeatedly declared Congressional will in this respect, as the Secretary now argues (Brief 139), the context corroborates the plain verbal meaning. No projects were authorized apart from Buggs Island and Philpott. The general plan was "approved" only as a statement of Congressional judgment, so that the projects left unauthorized could be acted on in any later proceedings before the Congress or the Commission in the light of this judgment.

The wisdom of having a general plan before taking a particular step does not need to be defended in this Court. The Congress was only conforming to a standard of care it had exacted of the Commission by §10 of the Federal Power Act of 1920 that no authorization of any particular project in a basin, less than all possible projects, should be made without first determining that it would be consistent with maximum development of the total potentialities. This was made clear in the hearings below by the Commission Engineer:

"In a comprehensive plan, as such, the essential point is to make sure that the power sites are properly protected

so they can be developed when economical. The installation, the hydraulic capacity, the design, is a matter of detail which is taken up as each project comes up, as in the case of Buggs Island, but the basic concept is to protect the power sites on an overall basis." (IV 159-60)

The mere fact that several projects are included in a general plan does not establish any interdependence between them. Congressional approval of a comprehensive plan and authorization of two projects in it does not preclude licensed development of other projects which the Congress did not authorize any more than Commission determination that a project is best adapted to a comprehensive plan precludes the issuance of licenses for other potential projects in the basin. When the Congress authorizes any particular project, it is recognized that the other projects in the plan "might never be completed".[13] But the Congressional judgment would prove a beacon to the Commission in any subsequent licensing provisions for the Roanoke River.

Since the Congress showed no intention to authorize construction of the straight power project at Roanoke Rapids here in issue, indeed showed every inclination to adhere to the settled policy against such construction by public funds, there is no basis for the Secretary's argument of an implied repeal of the Commission's ordinary licensing power under §4 of the Federal Power Act. Such an argument assumes that the Congress would overturn its settled policy without saying so, indeed while protesting allegiance to that policy, and would thus silently repeal the cornerstone of its regulatory scheme for water power development. This is not

[13] Colonel Gee, of the Army Engineers, testifying before the House Committee on Public Works (Hearings on H. R. 5472 (Title II), 81st Cong., 1st Sess. 143-44, 1949).

a persuasive estimate of the legislative process on these important questions of public concern. Under proper appraisal, the legislative proceedings preclude any argument that the straight power project at Roanoke Rapids has been withdrawn from the Commission's licensing power under § 4 of the Federal Power Act. Any other interpretation would frustrate the fundamental Congressional policy embodied in §§ 4 and 10 of the Federal Power Act since 1920 to encourage speedy and comprehensive development of water power resources. It would arrest all commercial development of projects in a general plan that has been approved by the Congress, though the Congress has in conformity with its settled policy refused to authorize their construction by public funds and may well adhere to that policy through the long future. This would contradict a declared policy by inference from one not declared.

6.

THE FLOOD CONTROL ACT OF 1950

To this point we have seen a clear grant of authority to the Commission in 1920 to license this straight power project at Roanoke Rapids and a repeated refusal by the Congress to authorize the construction of straight power projects with public funds. On such a record we submit there can be no substantial argument for an implied repeal of the licensing power through mere endorsement of a general plan.

The last episode, now to be considered, in the Congressional history affords a striking confirmation of this position. In the legislative consideration of the Flood Control Act of 1950, it was demonstrated that the position here urged is in accord with the Congressional understanding of the purpose and effect of its action in 1944.

The point came up in two ways, on separate proposals to authorize the Smith Mountain project and the Hartwell project, both of which are included in general plans that were approved in the Flood Control Act of 1944, precisely as was the Roanoke Rapids project here involved.

The Smith Mountain project is one of the 11 projects dealt with in the comprehensive plan for the Roanoke River recommended in House Document No. 650 (I 158). In this respect it stands on the same footing as Roanoke Rapids. But it promises a minor benefit to flood control, in contrast to Roanoke Rapids, which offers none.[14] If the mere approval of the general plan had involved an authorization of Smith Mountain, the Congress did not need to be asked for further action in that regard. Yet two bills were introduced in 1949 to authorize the Smith Mountain project (H. R. 3250 and H. R. 3416, 81st Cong., 1st Sess.). Both were rejected by the House Committee. There is nothing in the legislative proceedings to suggest that this was merely a question of the order in which the successive projects in the Roanoke River plan should be undertaken, as the Secretary argues (Brief 111, 131-33). To the contrary, the Congress simply did not want Smith Mountain built with public funds, as the court below recognized (V 36). The Congress plainly has no present disposition to authorize any additional projects proposed in the Roanoke River plan.

The Hartwell project is not a part of the Roanoke River plan, but is a part of the Savannah River plan which had likewise been "approved", in identical words, by the Flood Control Act of 1944:

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[14] With an estimated construction cost of $12,500,000 and annual charges of $583,800, the flood control benefits at Smith Mountain were only $10,000 (I 158).

"SAVANNAH RIVER BASIN

"The general plan for the comprehensive development of the Savannah River Basin for flood control and other purposes recommended by the Chief of Engineers in House Document Numbered 657, Seventy-eighth Congress, second session, is approved and the construction of the Clark Hill Reservoir on the Savannah River in South Carolina and Georgia, is hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in that report at an estimated cost of $35,300,000." (Flood Control Act of 1944, § 10)

A bill to authorize the Hartwell project was introduced in 1949 (H. R. 2283, 81st Cong., 1st Sess.). This again had nothing whatever to do with the mere order in which the successive projects should be undertaken. The Clark Hill project was the first in the Savannah River plan; its construction was proceeding; and the Hartwell project was the second and thus came up in regular order. Congressional action would have been wholly unnecessary if the 1944 approval of the general plan and simultaneous authorization of the Clark Hill project within that general plan were to be given the effect of authorizing the Hartwell project also. An appropriation would have been in order and the only thing needed. Nevertheless the Congress enacted the authorization for Hartwell as a part of the Flood Control Act of 1950 (64 Stat. 163, 170), thus making unmistakable its conception of the effect to be accorded the approval of a general plan.

The hearings on this bill before the House Committee on Public Works throw a spotlight on the Congressional purpose in approving general plans. Colonel Gee was introduced to the Committee by the Chief of Engineers, United States Army, to testify in behalf of the Corps of Engineers. The whole issue is summed up in this colloquy concerning Hart-

well between Chairman Whittington and Colonel Gee of the Army Engineers:

> "Colonel Gee. The project is a part of the approved plan, sir.
>
> "The Chairman. What you mean by that to say, let us understand what you mean. Is not the word 'approved' an authorization for the plan but without appropriation, or without an authorization for the appropriation?
>
> "What is the difference between approving and authorizing a plan?
>
> "Colonel Gee. We have never construed the approval of the plan to carry with it the authorization to construct the elements of that plan.
>
> "The Chairman. Nor do we." (Hearings before the House Committee on Public Works on H. R. 5472 (Title II), 81st Cong., 1st Sess. 42, 1949).

The Secretary misapprehends our argument when he answers that Colonel Gee is not an authoritative spokesman of the Congressional intent (Brief 134-35). We do not say he is. But the Chairman of the House Committee occupies a different position. It is a point of great practical importance that the Committee bearing the responsibility for policy decision in these matters and the Corps of Engineers bearing the responsibility for their execution have exactly the same understanding as to the effect of approving a general plan.

The understanding they share goes further and recognizes specifically that, as a consequence of this principle, commercial capital is free to develop the Roanoke Rapids project upon appropriate Commission authorization. Thus later in the hearing Colonel Gee testified:

> "Since the development of Buggs Island has begun, a private utility company has filed an application with

the Federal Power Commission to develop the Roanoke Rapids project. This development of the Roanoke Rapids project is to be exactly in accordance with the project as recommended by the Chief of Engineers in this document. The hearings were conducted by the Federal Power Commission last week on that application. We have no information as to the outcome of those hearings. That project was the third project recommended in the original report of the Chief of Engineers.

"The fourth project, the Gaston, it is believed that a private utility company will file an application for the construction of that project in the near future." (Hearings, *supra*, p. 137)

With this point clearly made, the discussion then proceeded:

"Mr. Pickett. I understand in the over-all comprehensive plan that you have proposed 11 reservoir structures, only three of which have any part of their purpose to be flood control.

"Colonel Gee. That is correct, sir.

"Mr. Pickett. And those three are Philpott, Buggs Island, and Smith Mountain.

"Colonel Gee. Yes, sir.

"Mr. Pickett. Smith Mountain is the one presently under consideration, and you have under authorization and construction both Philpott and Buggs Island.

"Colonel Gee. That is correct, sir." (Hearings, *supra*, p. 141)

* * *

"Colonel Gee. We would be remiss in our duty as engineers serving the Congress if we did not point out to you the potentialities of the Roanoke River Basin. We have said in the report that the building of 3 of these 11 projects will produce all of that flood control

which we believe to be economically justified, that the remaining 8 are straight power projects, and if it is desired that power projects be built by the Federal Government, we believe these are the sites best adapted to that purpose, and this is approximately what it will cost to develop the full capabilities of that river basin." (Hearings, *supra*, p. 143)

This was all summed up in this succinct statement as to Roanoke Rapids:

"Mr. Angell. Is the Federal Government at the present time planning to develop any of those dams on the lower part of the river which are devoted exclusively to power production?

"Colonel Gee. No, sir. They have the same status in this basin plan as the eight remaining projects. They are part of the approved plan. Their being in that plan certainly is no bar to a private utility company coming in and seeking to develop one of these projects.

"Mr. Angell. And that is what is being done now.

"Colonel Gee. That is being done now at Roanoke Rapids, sir." (Hearings, *supra*, p. 144)

With this clear understanding as to the legal status of Roanoke Rapids, the Committee was evidently content, since it took no action to change that situation in any way, whether by provision in the bill then before it or otherwise. By sustaining this interpretation the Court will enforce the Congressional design.

In contrast, the interpretation urged by the Secretary would create a wholly new Congressional policy under the guise of giving a "liberal construction" to remedial legislation (Brief 174-76). Avowedly the "evil there recognized" was the recurrence of destructive floods and it is for this

reason that the Secretary urges "the broadest possible construction which would accomplish the remedies against floods to the fullest possible extent" (Brief 174-75). But as this purpose supplies a guide to interpretation, so also it supplies a limit. On the facts, it is conclusively established here by the findings of the Commission that the Roanoke Rapids site has no relation whatever to flood control but is a straight power project.

Indeed this is exactly the way in which it has always been presented to the Congress from its initial recommendation in House Document No. 650 in 1944 to the testimony of the Army Engineers underlying the Flood Control Act of 1950. It was on such facts that the Congress made its choice to authorize the multi-purpose dams at Buggs Island and Philpott but to exclude from Federal authorization the straight power projects in the rest of the plan, including the Roanoke Rapids site. It would not be a "liberal" construction to apply the Act so broadly as to promote an aim that the Congress, so far from favoring, deliberately rejected. The issue is not a private right against a public one (Secretary's Brief 176-78), but the effectuation of a policy that the Congress has declared. The risk in which the Secretary supposes the Commission's jurisdiction to place river basin plans (Brief 61) is an illusion. The Congress exercises continuous direction of its flood control program in its successive Flood Control Acts. The agency of the Congress, the Commission, will be directed as the Congress may see fit.

This is purely an issue of legislative policy where, in the closing words of the President's Water Resources Policy Commission: "It is for Congress to decide what should be done" (Report, 1950, p. 303). The Congress has decided against the contention of the Secretary. The Congress can not reasonably be taken to have appropriated for exclusive Federal development any straight power project while at the

same time disclaiming any intention to apply public funds to such a purpose. When the Congress authorizes a multi-purpose project in a general plan, it does not thereby appropriate a straight power project at some other site in the general plan which can not, whether constructed or abandoned, affect the operation of the authorized works adversely in any degree. The only explanation for approving the general plan is the simple and sufficient one that it explains the grounds of Congressional action and affords a guide to subsequent proceedings before the Congress and the Commission. When we note that this understanding is shared by the Committee in charge, which deems the straight power projects in an approved plan available for commercial development whenever licensed by the Commission, the case against the Secretary on this principal issue in the case is decisive and complete. This determination alone requires that the judgment below should be affirmed.

B.

THE COMMISSION IS NOT BARRED UNDER § 7(b)

The Commission, as the guardian of the public interest with respect to hydroelectric developments in navigable streams of the United States, is authorized to withhold a license for any particular project in order that it may be undertaken by the United States alone:

> "Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but . . . shall submit its findings to Congress with such recommendations as it may find appropriate . . ." (§7(b) of the Federal Power Act)

Secondary to the main argument dealt with in A above, the Secretary urges that, even if the Congress did not repeal by implication the Commission's basic authority to license hydroelectric developments, in so far as the Roanoke Rapids site is concerned, by enacting the Flood Control Act of 1944, nevertheless the Commission has forfeited its jurisdiction by expressing a judgment under §7(b) that the Roanoke Rapids site should be "undertaken by the United States itself" (Brief 206-246).

This contention is based on the Commission's 1944 letter to the Chief of Engineers (I 138) in which it was said that the Commission

> ". . . concurs in the conclusion of the Board of Engineers for Rivers and Harbors that the comprehensive development of the Roanoke River Basin, in general accordance with the plans prepared therefor by the district engineer consisting of 11 dam and reservoir projects with power, is desirable and that the Buggs Island and Philpott projects would constitute a desirable initial step in the development of the Roanoke River Basin" (I 142).

But this falls far short of a judgment that each of the 11 projects in the comprehensive plan should be developed exclusively by the United States. The engineering report in which the Commission concurs (House Doc. 650, I 135) is not a recommendation that the Congress renounce its policy against construction of straight power projects by public funds. It is solely an inquiry into the projects, whether for flood control or power generation, that would represent the maximum utilization of the potential resources in the Roanoke River Basin. To show the greatest practicable development, the Report speaks in terms of Federal development, so that estimated costs may omit any provision for taxes,

may omit any provision for insurance costs and may include a provision for interest of only 3%. But nowhere in the Report is there any clear recommendation that construction be carried out exclusively by the United States. From the context it is plain, therefore, that the Commission's concurrence did not purport to express any judgment on its part except as to the location and nature of the projects that would best promote the maximum development of the potentialities of the basin. On these points the Commission concurred in the recommendation as to the general location of potential project sites in the basin and the purposes they should serve. At Roanoke Rapids the judgment was that the development best adapted to the comprehensive plan would be construction of a purely hydroelectric project. But there is no reference to §7(b), and no explicit reference to construction by the United States, least of all any finding, as required by the Act, that in the judgment of the Commission the development (of the particular project) should be "undertaken by the United States itself".

But the Court is not required to view the Secretary's contention in a vacuum. Accepting the Secretary's assertion that it is "a question of fact" whether the Commission has or has not expressed its judgment that the development of the Roanoke River should be undertaken by the United States alone (Brief 207), we point out that the Commission's findings of fact, which are unchallenged and conclusive here, dispose of that issue as follows:

> "The concurrence by the Federal Power Commission in the recommendations of the Corps of Engineers contained in House Document No. 650, did not constitute a finding or recommendation submitted to Congress under the provisions of Section 7(b)" (I 68).

Quite independently of this, it is not in accord with the Commission's public responsibilities in the administration of the Federal Power Act to assert that a judgment on engineering facts, even if expressed in favor of development by the United States alone, forever precludes the Commission from reaching a different conclusion as the relevant circumstances may evolve with time. There is no need here to tie the hands of government by arguments from private law like the doctrine of estoppel. In these administrative matters the Commission should rather be viewed as entrusted with a continuing responsibility. Analogously, the Act provides that where the Commission finds for Federal generation of power at a Federal dam and so reports to the Congress, the Commission is not barred, except for two years after making such a report, from licensing commercial development of power at the Federal dam (§4(e)). With such a standard as to dams already built by the Federal government, the Congress could hardly have intended a permanent forfeiture of Commission power as to dams that the Federal government has not decided to build.

The Commission leaves no doubt of its present judgment on this issue. It considered the question whether such a recommendation should be made under §7(b) (I 44) and concluded against it, saying:

> "The record in this proceeding does not provide a proper or sufficient basis for judgment or a finding under Section 7(b) of the Act that development of the water resources at Roanoke Rapids should be undertaken by the United States itself or for the submission of such findings and a recommendation to Congress to such effect as provided in such Section" (I 68).

The rest of the Secretary's argument that the Commission's 1944 report disables it from issuing a commercial

license at the present time rests on the assertion that the Roanoke Rapids project is one "affecting" the other developments that the comprehensive plan proposed for the Roanoke River Basin, particularly that at Buggs Island. Here again we agree with the Secretary that this question "is also a question of fact" (Brief 213). As a question of fact, however, it is also foreclosed by the Commission's finding, already quoted, that:

> "Congress has already provided for substantial flood control in the Roanoke River Basin and development of the Roanoke Rapids site for power [as contemplated by the license here under review] will neither enhance nor detract from the benefits sought by Congress in this respect." (I 45)

> "The Roanoke Rapids project, either as contemplated by the Applicant or exactly as proposed in House Document No. 650, would have no effect (either beneficial or adverse) upon the flood-control plans for the basin." (I 53)

Turning now from the declared Federal policy of flood control in the Roanoke River Basin to the responsibility of the Secretary to market "surplus energy" from such projects as may be authorized and constructed, the Commission further found:

> "It has not been shown that licensing of the development of the Roanoke Rapids project to the Applicant, a private utility company, would have any adverse effect upon the marketing of surplus energy from the Buggs Island project within the terms and meaning of [*i.e.*, which he is authorized to market by] Section 5 of the Flood Control Act of 1944." (I 65)

The Commission further found that any consequential effect of Roanoke Rapids on the straight power project 7 miles upstream at the Gaston site would not be of serious dimensions, and that adequate protection could be provided through suitable precautions in the course of construction (I 75).

From these findings it is plain that the Roanoke Rapids project here involved is wholly separable from all the others in the comprehensive plan and its commercial development will in no sense obstruct or impede the Federal aim.

It is not for this Court to spell out the findings that should be made in engineering matters of this kind when certiorari is granted to review specified legal questions in the absence of any attack on the Commission's findings. The Secretary's argument on this secondary question raises no new issue of law and is concluded on the facts. In this respect also the judgment below should be affirmed.

C.

The Standing of the Secretary to Sue

The reasons that led the court below to hold that the Secretary was not a "person aggrieved" within the meaning of §313 of the Federal Power Act are incisively stated in its Opinion (at V 30-32). They are developed at length in the brief for the Commission. Relying on both those presentations, we need do more than summarize.

Protection of the public interest in the use of navigable waters is committed to the Commission and the Corps of Engineers of the Department of the Army, who have acted in close liaison since the enactment of the Federal Power Act in 1920. There is no apparent Congressional expectation that any Government agency should have authority to attack the

issuance of a license by the institution of court proceedings. Where such an appeal rests on the conception that the Congress has entered upon Federal construction of particular projects by the Flood Control Act of 1944, any right to review a Commission determination that such entry is not a conclusive appropriation for the Federal use should vest in the Corps of Engineers, for it is they who have the statutory function of constructing any authorized project for the United States, or at most in the Secretary of Defense who is their official in charge. But they do not appeal here. On the contrary, the Engineers filed a report with the Commission recommending that the project as proposed by the Company was in accord with the interests of navigation.

Beyond the Corps of Engineers as the Government agency immediately affected by the authorization or non-authorization of a particular project or the Secretary of Defense, as their official in charge, there is no reason to suppose that any members of the Cabinet, unless it be the Attorney General or Solicitor General as the general law officers of the United States, have any interest that entitles them to bring a debate of policy here for determination as a case or controversy in this Court. In particular, the Secretary of the Interior has no such interest. He has no interest whatever except to dispose of any energy that may be generated at a project "under the control of the War Department" which in the opinion of the Secretary of War shall be "not required in the operation" (§ 5 of the Flood Control Act of 1944, 58 Stat. 887, 890). Only when the Congress authorizes the construction of a project and appropriates money for it and the construction is completed and the Secretary of War determines that there is surplus energy does the Secretary of the Interior have any function to perform. He has no function or responsibility with regard to the authorization or construction of any hydroelectric facilities. A responsibility to advise the Congress is not an interest to go to court. The

cooperatives who say they would purchase from him if he had surplus power for sale have still less interest to complain.

The sovereign's right to take its agency to court (sustained in appropriate contest; *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 1949) is not the point. Not every person may have review simply by suing in the name of the United States. No more can every government officer do so. As a private party must have an affected personal interest, so a government officer must have an affected government interest entrusted to his protection. The Secretary here has none.

Admission of the Secretary as an intervenor before the Commission was only by way of courtesy and expressly disclaimed any admission that he was "aggrieved" as the statute requires as a condition to the institution of review proceedings (I 71). The Commission has licensed the project, the Army Engineers have approved and the Department of Justice has taken no action. When those whom the Congress has designated see no reason to institute judicial proceedings, no right of review results to those who have no interest to complain. Observance of this rule is important for orderly dispatch of Governmental business.

These considerations are aggravated in the present case by the Secretary's appearance in this Court without customary representation by the Department of Justice. While special statutes have authorized representation by agency counsel in special cases, none exists here to authorize the Secretary of the Interior to speak through departmental employees alone for the Department of Justice must be the official representative of the United States for such purposes (5 U. S. C. §§ 306, 309, 310; *The Gray Jacket*, 5 Wall. 370 (1866); *Sutherland* v. *International Insurance Co.*, 43 F 2d 969 (2d Cir. 1930), *cert. denied* 282 U. S. 890 (1931); cf. *Securities and Exchange Commission* v. *Robert Collier & Co.*, 76 F 2d 939 (2nd Cir. 1935). A consent by the Solicitor

General is insufficient for this purpose. Authority should be conferred by statute.

The decision of the court below (V 30-32) that the Secretary of the Interior and the rural cooperatives were without standing to complain is accordingly correct and in this further respect also merits affirmance.

CONCLUSION

The Commission's basic jurisdiction to license a hydroelectric development by commercial capital at the Roanoke Rapids site was not repealed by implication when the Congress "approved" the comprehensive plan for the Roanoke River in the Flood Control Act of 1944. The secondary argument that the Commission forfeited its public authority in this regard by concurring in the recommendation of the Roanoke River plan is without substance. Quite apart from these conclusions on the merits, the Secretary has no interest that makes him "aggrieved" and competent to sue. The judgment below should, therefore, be affirmed.

Dated October 15, 1952.

Respectfully submitted,

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APPENDIX

Statutes Principally Involved

(1)

Excerpts from the Federal Power Act

SEC. 4. The Commission is hereby authorized and empowered—

(a) To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes; and what is a fair value of such power, to the extent the Commission may deem necessary or useful for the purposes of this Act.

(b) To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall, upon oath, within a reasonable period of time to be fixed by the Commission, after the construction of the original project or any addition thereto or betterment thereof, file with the Commission in such detail as the Commission may require, a statement in duplicate showing the actual legitimate original cost of construction of such project, addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands. The licensee shall grant to the Commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto. The statement of actual legiti-

mate original cost of said project, and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury.

(c) To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the Commission to furnish such records, papers, and information in their possession as may be requested by the Commission, and temporarily to detail to the Commission such officers or experts as may be necessary in such investigations.

(d) To make public from time to time the information secured hereunder and to provide for the publication of its reports and investigations in such form and manner as may be best adapted for public information and use. The Commission, on or before the 3rd day of January of each year, shall submit to Congress for the fiscal year preceding a classified report showing the permits and licenses issued under this Part, and in each case the parties thereto, the terms prescribed, and the moneys received if any, or account thereof. Such report shall contain the names and show the compensation of the persons employed by the Commission.

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which

Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further,* That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of

this section, notice shall be given and published as required by the proviso of said subsection.

(f) To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 9 hereof: *Provided, however*, That upon the filing of any application for a preliminary permit by any person, association, or corporation the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated.

(g) Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, state or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region. (16 U. S. C. §797.)

* * * * *

SEC. 7. . . .

(b) Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such

examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development. (16 U. S. C. § 800.)

* * * * *

SEC. 10. All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval. (16 U. S. C. § 10.)

(2)

Excerpts from the Flood Control Act of 1944.

(Act of December 29, 1944, 58 Stat. 887)

SEC. 10. That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the post-war construction program, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein: *Pro-*

vided, That the necessary plans, specifications, and preliminary work may be prosecuted on any project authorized in this Act to be constructed by the War Department during the war, with funds from appropriations heretofore or hereafter made for flood control, so as to be ready for rapid inauguration of a post-war program of construction: *Provided further,* That when the existing critical situation with respect to materials, equipment, and manpower no longer exists, and in any event not later than immediately following the cessation of hostilities in the present war, the projects herein shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements: *And provided further,* That penstocks and other similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam authorized in this Act for construction by the War Department when approved by the Secretary of War on the recommendation of the Chief of Engineers and the Federal Power Commission. (58 Stat. 887, 891)

* * * * *

ROANOKE RIVER BASIN

The general plan for the comprehensive development of the Roanoke River Basin for flood control and other purposes recommended by the Chief of Engineers in House Document Numbered 650, Seventy-eighth Congress, second session, is approved and the construction of the Buggs Island Reservoir on the Roanoke River in Virginia and North Carolina, and the Philpott Reservoir on the Smith River in Virginia, are hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in that report at an estimated cost of $36,140,000. (58 Stat. 887, 894)

* * * * *

Savannah River Basin

The general plan for the comprehensive development of the Savannah River Basin for flood control and other purposes recommended by the Chief of Engineers in House Document Numbered 657, Seventy-eighth Congress, second session, is approved and the construction of the Clark Hill Reservoir on the Savannah River in South Carolina and Georgia, is hereby authorized substantially in accordance report at an estimated cost of $35,300,000. (58 Stat. 887, 894)